

**FEDERALISM AND GOVERNANCE IN CANADA
LAW 525**

READINGS

VOLUME I

Professor Richard Simeon

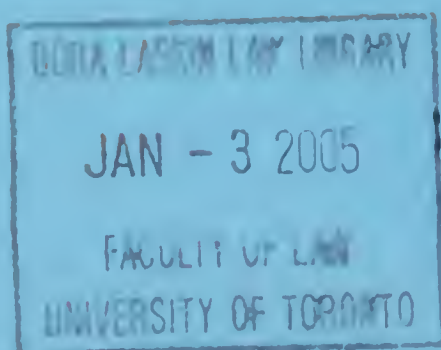
**Faculty of Law
University of Toronto**

Winter 2005

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LAW 525 HS

Federalism and Governance in Canada

Winter 2005

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Objectives of the Course

Federalism, along with parliamentary government and the Charter of Rights and Freedoms, is one of the three fundamental pillars of governance in Canada. Virtually every issue that confronts Canadian citizens and their governments bumps up against federalism and intergovernmental relations at some point. This course aims to explore the law and politics of federalism and intergovernmental relations in Canada, from three vantage points: What are the implications of federalism for governance and for policy outcomes; for the accommodation and management of regional, linguistic and ethnic difference; and for democratic politics – transparency, responsiveness and accountability? In each of these areas, we will observe a 'deficit.' So, in addition to analysing the current dynamics of federalism, we will also explore options for reform. Thus we will focus strongly on some of the major issues facing the federation, and rely on a number of related policy documents from governments and other actors.

The major assignment for the course is a research essay in which students will explore the law and politics of federalism as they affect policy outcomes in a chosen area of public policy.

Course Format

This is a seminar course. In the first weeks, we will concentrate on class discussion of some central themes and issues in the study of federalism in Canada, based on common readings, and on introductory presentations by the instructor. In the final weeks of the course, following opening discussion of the main issues, students will present the results of their own work on how federalism and intergovernmental relations play out in a variety of policy areas. Students should begin thinking about the policy areas they wish to investigate as early as possible in the term. A short statement describing the proposed paper is due February 5.

Course requirements and grading

1. Class participation: 20 per cent.
2. Class presentation of project: 15 per cent.
3. Final paper. 20 – 25 pages. Due last day of class. 65 per cent.

Materials:

Almost all reading materials for the course will be available in a reader in the Law School bookstore; a few are found on the internet. Students are also asked to purchase two books: *Canadian Federalism: Performance, Effectiveness and Legitimacy*, Eds. Herman Bakvis and Grace Skogstad, Don Mills: Oxford University Press, 2002; and *Reconsidering the Institutions of Executive Federalism*, Eds. J. Peter Meekison, et. al. Montreal and Kingston: McGill-Queen's University Press. They are also in the bookstore.

You will note that a large number of readings have been assigned on each topic. This is designed to provide a full sense of the varied opinions on each subject. The most critical readings are marked with an asterisk. Read selectively and according to your own interests in the other listed materials.

COURSE OUTLINE

PART ONE

Week One: (January 6) Introduction

- Introduction: course objectives
- Course requirements
- Three perspectives or lenses: Federalism and democracy, federalism and good governance; federalism and the management of conflict in a divided society
- Canadian federalism in comparative perspective
- A brief overview of the evolution of federalism in Canada

Reading: None required

Students may wish to consult the following:

- *Ian Robinson and Richard Simeon, "The Dynamics of Canadian Federalism," in James Bickerton and Alain-G. Gagnon, Eds., *Canadian Politics* (3rd ed.) Peterborough: Broadview Press, 1999. 239-262.
- *Ronald L. Watts, *Comparing Federal Systems* (2nd Ed.) Kingston: Institute of Intergovernmental Relations, 1999. pp. 1-20, 120-123.
- Herman Bakvis and Grace Skogstad, 'Canadian Federalism: Performance, Effectiveness and Legitimacy,' in their book of the same title. Don Mills: Oxford University Press 2000. pp. 3-23.

Week Two: (January 13) The Social, Cultural and Economic Context

- National unity
- Regionalism
- Quebec nationalism
- Aboriginal 'treaty federalism.'
- Cross-cutting themes: class, gender, etc.

Reading:

- Donald V. Smiley, "The Compounded Crisis in Canadian Federalism,' from *Canada in Question*. Pp. 171-188
- Frank L. Graves, et. al., 'Identity and National Attachments in Canada,' in Harvey Lazar and Tom McIntosh, Eds., *How Canadians Connect. Canada: The State of the Federation 1998/1999*. Kingston: Institute of Intergovernmental Relations, 1999. Pp. 307-341.

- *Thomas J. Courchene, "Broadening, Deepening and Re-territorializing Federalism: NAFTA and KBE Perspectives," Paper prepared for Conference Quebec and Canada in the New Century, Kingston: Institute of Intergovernmental Relations, October-November 2003.
- *Shawn Henry, 'Re-visiting Western Alienation,' in Lisa Young and Keith Archer, Eds., *Regionalism and Party Politics in Canada*. Don Mills: Oxford University Press, 2002. Pp. 77-91.
- *David Cameron and Richard Simeon, 'Ontario in Confederation: The Not-So-Friendly Giant,' in Graham White, Ed., *The Government and Politics of Ontario*. 5th ed., Toronto: University of Toronto Press, 1997. pp. 158-185.
- Daniel Salée, 'Quebec's Changing Political Culture and the Future of Federal-Provincial Relations in Canada,' in Hamish Telford and Harvey Lazar, Eds., *Canadian Political Cultures in Transition Canada : The State of the Federation, 2001*. Kingston and Montreal: McGill-Queen's University Press, 2002. pp.163-197.
- *Will Kymlicka, "Multinational Federalism in Canada: Re-thinking the Partnership," *Policy Options* March, 1998. 5-8.
- Jane Jenson, "Distinct Societies, Citizenship Regimes and partnership." *Policy Options*, March 1998. Pp. 28-30.
- *Stephen Harper, et. al, 'The Alberta Agenda.' Letter to Ralph Klein. *Policy Options*, April 2001. Pp. 16-17.
- Robert G. Finbow, 'Atlantic Canada in the New Right Era: The Necessity of Unity?' in David Taras and Beverly Rasporich, Eds. *A Passion for Identity*. Scarborough: Nelson Thompson learning, 2001. Pp. 311-330.
- Jill Vickers, 'Why Should Women Care about Federalism?' in Douglas Brown and Janet Hiebert, Eds., *Canada: The State of the Federation 1994*. Kingston: McGill-Queen's University Press, 1994.
- *Frances Abele and Michael Prince, 'Alternative Futures: Aboriginal Peoples and Canadian Federalism,' in Bakvis and Skogstad, pp. 220-236

Week Three: (January 20) The Institutional context

- Federalism and parliamentary government
- Federalism and the Charter
- Federalism and judicial review
- Federalism and the party system
- Regional representation at the center: The Senate

Reading:

- *A. Brian Tanguay, 'Political parties and Canadian Democracy: Making Federalism do the Heavy Lifting,' in Herman Bakvis and Grace Skogstad, Eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy*. Don Mills: Oxford University Press, 2002. pp. 296-316.
- *Gerald Baier, 'Judicial Review and Canadian Federalism,' in Bakvis and Skogstad. Pp. 24-39.
- C. E. S. Franks, "A Continuing Canadian Conundrum: The Role of parliament in Questions of national Unity and Processes of Amending the Constitution," in *Reconsidering the Institutions of Canadian Federalism*. Pp. 35-56.
- James B. Kelly, "Guarding the Constitution: Parliamentary and Judicial Roles Under the Charter," in *Reconsidering*, pp. 77-112.
- R. v. S.S., [1990] 2 S.C.R. 254 (The Charter)
- Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995
- *Jack Stilborn, "Senate Reform Proposals in Comparative Perspective." Library of parliament, Parliamentary Research Branch. November, 1992.

- Tom Kent, "An Elected Senate: Key to Redressing the Democratic Deficit, Revitalizing Federalism," *Policy Options*, April 2004. Pp. 49-53.

PART TWO: THE DYNAMICS OF FEDERALISM AND INTERGOVERNMENTAL RELATIONS

Week Four: (January 27) Who does what? The division of powers

- Federal, provincial, and local responsibilities
- Criteria for the allocation of responsibilities
- Substantive powers: the economic union; the social union; the environmental union; trade; other
- Policy instruments: the powers to tax, spend, borrow, regulate
- Overlap, interdependence, and concurrency
- 'Disentanglement' or 'sharing?'
- 'Symmetry' or 'asymmetry?'
- A new division of powers for the 21st century?

Reading:

- *Constitution Act, 1867*. Ss. 91, 92.
- Kenneth Norrie, Richard Simeon and Mark Krasnick, *Federalism and the Economic Union in Canada*. Studies for the Royal Commission on the Economic Union and development Prospects for Canada, vol. 59). Toronto: University of Toronto Press, 1985. Pp. 41-59.
- *Richard Simeon, "The Division of Powers and Responsibilities in Canada: Draft Country Report." Paper presented to Forum of Federations and IACFS, Global Dialogue Series. Delhi, India, November 2003.
- (Spending power). *YMHA Jewish Community Centre v. Brown*, [1989] 1 S.C.R. 1532; *Reference re. Canada Assistance Plan*, [1991] 2 S.C.R. 525.
- *A. Petter, 'Federalism and the Myth of the Federal Spending Power,' in *Can. Bar Rev.* 68: (1989).
- *Thomas J. Courchene, *ACCESS: A Convention on the Canadian Economic and Social Systems*. Paper prepared for Ontario Ministry of Intergovernmental Affairs, 1996.
- (Peace, Order and Good Government) *Crown Zellerbach Canada Ltd.*, 49 D.L.R. (4th) 161.
- (Property and Civil Rights) *Central Canada Potash v. Government of Saskatchewan*, [1979] 1 S.C.R. 42
- (International). R. Howse, "'The Labour Conventions Doctrine in an Era of Interdependence,' *Ca. Bus. Law J.* 16: (1990). Pp. 163-178.
- Donald G. Lenihan, "Federalism in the Information Age: From the Division of Powers to Citizen-Centred Government." *Policy Options*, November 2004. pp. 43-47.

Week Five: (February 3) Intergovernmental Relations

- The institutions of IGR
- The political dynamics of IGR
- Intergovernmental Agreements and Accords
- IGR and the citizen: Fixing the 'democratic deficit.'
- Innovation: A new Council of the Federation

Reading:

- *S. Choudhry, 'Bill 11, the *Canada Health Act*, and the Social Union: The Need for Institutions,' *Osgoode hall L. J.* 38: (2000). P. 39-76.
- *Stefan Dupré, 'Reflections on the Workability of Executive Federalism.' In Richard Simeon (Coordinator), *Intergovernmental Relations*, Toronto: University of Toronto Press, 1985. Pp. 1-32.
- *Council of the Federation, *Founding Agreement*. Ottawa: Canadian Intergovernmental Conference Secretariat. 2003.
- Commentaries on the Council, Institute of Intergovernmental Relations and Institute for Research on Public Policy, October 2003. Lazar, Burelle, Gibbins, Noel, Abele and Prince.
- David Cameron and Jennifer McRae-Logie, "Coping with Conflicts and Disputes in the Health Care Field." Prepared for Romanow Commission on the Future of Health Care
- *In Meekison, et, al, *Reconsidering the Institutions of Canadian Federalism: Introduction*, one of Chapters 5, 6, 7, and Ch. 15.
- Alain Noel, 'Power and Purpose in Intergovernmental Relations,' *Policy Matters* 2: 6. Montreal: Institute for Research on Public Policy, 2001
- Richard Simeon and David Cameron, 'Intergovernmental Relations and Democratic Citizenship: An Oxymoron if ever there was one?' in Bakvis and Skogstad, op. cit.
- Intergovernmental Agreements. *Charlottetown Accord, 1992, Draft Legal Text. S 17.*

Week Six: (February 10) Fiscal Federalism: Money and Power

- The power to tax
- The 'spending power'
- Intergovernmental transfers
- Equalization
- Is there a fiscal 'imbalance?'

Reading:

- *Centre for Research and Information on Canada, *Sharing the Wealth*, a set of discussion papers. September 2002.
- Douglas M. Brown, 'Fiscal Federalism: The New Equilibrium between Equity and Efficiency,' in Bakvis and Skogstad. Pp. 59-84
- Paul Hobson and France St. Hilaire, 'The Evolution of Federal-Provincial Fiscal Relations: Putting Humpty-Dumpty Together Again.' In Harvey Iazar, Ed., *Canada: The State of the Federation 1999/2000. Towards a New Mission Statement for Canadian Fiscal Federalism*. Kingston and Montreal: McGill-Queen's University Press, 2000. Pp. 159-188.
- Douglas Clark, 'Canada's Equalization program in Principle and Practice in Robin Boadway and Paul Hobson, Eds., *Equalization: Its Contribution to Canada's Economic and Fiscal Progress*. Kingston: John Deutsch Institute 1998. Pp. 83-117.
- William B. P. Robson and Finn Poschmann, *Interprovincial Competition in Canada: Theory, Facts and Opinions.* Toronto: C. D. Howe Institute, 2001.
- Finance Ministers of Western Provinces and Territories, *Revitalizing Federal-Provincial/Territorial Fiscal Relations.* A presentation to Western Premiers, May 2001. OR
- Quebec. Commission on Fiscal Imbalance. *A New Division of Canada's Financial Resources: Report.* 2002. Summary and Recommendations.
- Canada. Department of Finance. *The Fiscal balance in Canada: The Facts.* July 2002.
- Finance Ministers of the Provinces and Territories, *Strengthening the Equalization Program.* September 2003.

- Government of Canada. *Prime Minister Announces new Equalization and Territorial Funding Formula Framework*. Press release, 24 October, 2004.
- Thomas Courchene, "Hourglass Federalism – How the Feds got the provinces to run out of money in a decade of liberal budgets." *Policy Options* April 2004, pp. 12-16.

Week Seven: (February 17) Reading Week. No class.

PART THREE: CURRENT ISSUES IN CANADIAN FEDERALISM

Note to students: In these weeks, we will focus the discussion around your own research on each of these sets of issues.

Week Eight: (February 24) Federalism and Social Policy

- The politics of the Social Union Framework Agreement (SUFA)
- 'National Values' versus Provincial variations: social citizenship in the federation.
- Federalism and health care
- Federalism and child care, disability and other social issues
- Student presentations.

Reading:

- *Keith Banting and Stan Corbett, 'Health Policy and Federalism: An Introduction,' in Banting and Corbett, *Health Policy and Federalism: A Comparative Perspective on Multi-level Governance*. Kingston: Institute of Intergovernmental Relations, and McGill-Queen's University Press, 2001. Pp. 1-35.
- *Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy." At: www.law.utoronto.ca/documents/choudhry/recasting_social.pdf.
- *Sarah Fortin, Alain Noel and France St. Hilaire, Eds., *Forging the Canadian Social Union: SUFA and Beyond*. Montreal: Institute for Research on Public Policy, 2003. Ch. 1. 1-21.
- K. O'Hara, *Securing the Social Union*. CPRN, 1998.
- *ONE of Antonia Maioni, 'Health Care in the New Millennium,' or Linda White, "The Child Care Agenda and the Social Union,' in Bakvis and Skogstad.
- *'A Framework to Improve the Social Union for Canadians,' An Agreement between the Government of Canada and the Governments of the provinces and Territories, February 4, 1999.
- *Reference re Canada Assistance Plan*. [1991] 2 S.C.R. 525.
- 'Health Care, Citizenship and Federalism.' Chapter Two, Commission on Health Care in Canada (Romanow Commission), *Building on Values: The Future of Health Care in Canada*.
- Tom Kent, "'In the National Interest': A Social Policy Agenda for a New Century – Restore Cooperative Federalism, Modernize Medicare, Put Children First." *Policy Options*, August 2004. Pp. 24-29.
- CICS, *A Ten Year Plan to Strengthen Health Care*. Federal-provincial Health Accord, September 2004.
- Quebec, *Asymmetrical Federalism that Respects Quebec's Jurisdiction*. 15 September 2004.
- W. B. P. Robson and D. Schwanen, *Social Union Agreement: Too Flawed to Last*. Toronto: C. D. Howe Institute, 1999.

Week Nine: (March 3) Federalism and the Environment

- Jurisdiction and values

- Intergovernmental harmonization accords.
- Negotiating Kyoto
- Student presentations.

Reading:

- *Mark S. Winfield, 'Environmental Policy and Federalism,' in Bakvis and Skogstad. Pp. 124-137.
- Canadian Council of Ministers of the Environment, *A Canada-Wide Accord on Environmental Harmonization*.
- *Patrick Fafard, "Environmental Harmonization: A Guide to the Future of Canadian Federalism?" *Canada Watch* 6: January 1998.
- Kathryn Harrison, "The Canada-Wide Accord: A Threat to National Standards," *Canada Watch* 6: (January 1998)
- *Friends of the Oldman River Society v. Canada* [1992] 1 S.C.R. 3.
- *Hydro Quebec vs. Quebec* 1997 3 S.C.R. 213
- *Jack Stilborn, "Canadian Intergovernmental Relations and the Kyoto Protocol: What happened, What Didn't?" Paper presented to the Canadian Political Science Association, May 2003.

Week Ten: (March 10) Federalism and the Economy

- The 'economic union' debate and the AIT.
- Trade and Commerce
- Case study: the softwood lumber dispute
- Globalization and Canadian federalism
- Student presentations

Reading:

- Kenneth Norrie, Richard Simeon and Mark Krasnick, 'Canada as an Economic Union,' Chapter 20 in *Federalism and the Economic Union in Canada*. Vol. 59 Research Studies of the Royal Commission on the Economic Union. Toronto: University of Toronto Press. Pp. 293-326.
- *Douglas Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada*. Montreal and Kingston: McGill-Queen's University Press, 2002. h. 9: Conclusions. Pp. 267-237.
- *ONE of Mark R. Macdonald, 'The Agreement on Internal Trade: Trade-offs for Economic Union and Federalism,' (pp. 124-137); Grace Skogstad, 'International Trade Policy and Canadian Federalism: A Constructive Tension?' (pp. 158-177); or Herman Bakvis, 'Checkerboard Federalism? Labour Market Development Policy in Canada,' (pp. 197-229) in Bakvis and Skogstad, *Canadian Federalism*.
- Daniel Schwanen, 'Happy Birthday AIT!' *Policy Options* 21 (2000).
- *David Schneiderman, 'Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation.' *Queen's Law Journal* 21: (1993). 125.
- *M. J. Trebilcock and R. Behboodi, 'The Canadian Agreement on Internal Trade: Retrospect and Prospects,' in Trebilcock and Daniel Schwanen, Eds., *Getting There: An Assessment of the Agreement in Internal Trade*. P. 20.
- Sujit Choudhry, "Strengthening the Economic Union: The Charter and the Agreement on Internal Trade." 2002 12 *Constitutional Forum*. 112-119.
www.law.utoronto.ca/documents/Choudhry/AIT.pdf.
-

Week Eleven: (March 17) Broadening the scope of Multilevel Governance

- Municipalities in the Canadian federal system
- Aboriginal governments in the federal system
- Student presentations

Reading:

- *Andrew Sancton, 'Municipalities, Cities and Globalization: Implications for Canadian Federalism,' in Bakvis and Skogstad, *Canadian Federalism*. Pp.261-277.
- *Frances Abele and Michael J. Prince, 'Alternative Futures: Aboriginal peoples and Canadian Federalism,' in Bakvis and Skogstad, *Canadian Federalism*. Pp. 220-237.
- Joseph Gosnell, 'The Nisga'a Treaty and the Diversity of Canadian Federalism.' *Documents*, Forum of Federations.
- *Federation of Canadian Municipalities, Brief to the Prime Minister's Task Force on Urban Issues OR Joint FCM/CAMA Task Force on the Future Role of Municipal Government, *Policy Statement on the Future Role of Municipal Government*, n.d.
- Joint FCM/CAMA Task Force on the Future Role of Municipal Government, *Policy Statement*. June 2002.
- Thomas J. Courchene, "Responding to the NAFTA Challenge: Ontario as a North American Region State and Toronto as a Global City Region." Paper prepared for Global City-Regions Conference, UCLA School of Public Policy and Social Research, October, 1999.
- City Solicitor, City of Toronto. *Powers of Canadian Cities: The Legal Framework*. 200, Updated October 2001.
- Provincial and Territorial Meeting of Ministers Responsible for Local Government, September 16-17, 2004. *Principles Underlying Federal Government Initiatives Regarding Municipalities*.
- *Patrick Macklem, *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001. Ch. 9., Pp. 265-285.

Week Twelve: (March 24) Federalism and National Unity

- From the Victoria Charter to the Charlottetown Accord: the failure to 'constitute ourselves as a sovereign people.'
- The Quebec referendum of 1995 and after: The Secession Reference, the Clarity Act and Quebec's response
- The continuing agenda: Non-constitutional Renewal?
- New governments in Ottawa, Quebec City, Ontario: a new era in federalism?

Reading:

- *Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Toronto: University of Toronto Press, 3rd ed, 2004. Ch. 12. pp. 228-272.
- A. Cairns, 'Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: the Case of Meech Lake,' *Canadian Public Policy* 4: (1988) S121.
- *Reference re Secession of Quebec*. [1998] 2 S.C.R. 217.
- Government of Canada. Bill C. 26 2000. *An Act to give effect to the requirement for clarity . . .*
- Government of Québec *Bill 99*. 2000. *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*. <http://publicationsduquebec.gouv.qc.ca/documents/gazette/prive/bill/99A0103.pdf>.

- *Patrick J. Monahan, *Doing the Rules: An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference*. Toronto: C. D. Howe Institute, 2000.
- Claude Ryan, *Consequences of the Quebec Secession Reference: The Clarity Bill and beyond*. Toronto: C. D. Howe Institute 2000.
- Centre for Research and Information on Canada. *Constitutionally Fatigued Quebecers Reject labels*. 5 November 2002.

Week Thirteen: (March 31): Bombs, Germs, Fires and Floods: Crisis Management in the Federal System

- The intergovernmental response to SARS: local, provincial, national and international dimensions. Participants TBA.

Reading:

- *Learning from SARS: Renewal of Public Health in Canada*. Report of the National Advisory Committee on SARS and Public Health. Ottawa: Health Canada, 2003. Executive Summary.

Week Fourteen: (April 7): Conclusion

- Concluding discussion. How well does our federalism serve the values of:
- Democracy: fixing the 'democratic deficit.'
- Effective governance: fixing the 'joint decision trap'
- Managing and accommodating diversity
- An agenda for continuing reform?

Reading:

Fred Cutler and Matthew Mendelsohn, 'What Kind of Federalism do Canadians (Outside Quebec) Want?' *Policy Options*, October, 2001. Pp. 23-29.

Jennifer Smith, *Federalism*. A volume in the Canadian democratic Audit series. Vancouver: UBC Press, 2004. Ch. 7. pp. 130-160.

Thomas J. Courchene, "Pan-Canadian Provincialism – the New Federalism and the Old Constitution." *Policy Options*, November 2004. 20-28

